

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

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ERIN WARE,

Plaintiff,

v.

SMITH, *et al.*,

Defendants.

Case No. 3:20-CV-00102-MMD-CLB

**REPORT AND RECOMMENDATION  
OF U.S. MAGISTRATE JUDGE<sup>1</sup>**

[ECF Nos. 30, 36]

This case involves a civil rights action filed by Erin Ware (“Ware”) against Defendant Robert Smith (“Smith”). Currently pending before the Court is Smith’s motion for summary judgment. (ECF No. 30.) In response, Ware filed a cross-motion for summary judgment, (ECF No. 36), and Smith responded, (ECF No. 37). No replies were filed. For the reasons stated below, the Court recommends that Smith’s motion for summary judgment, (ECF No. 30), be denied, and Ware’s cross-motion for summary judgment be denied, (ECF No. 36).

**I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

Ware is an inmate currently in the custody of the Nevada Department of Corrections (“NDOC”) and is currently housed at the Northern Nevada Correctional Center (“NNCC”). (ECF Nos. 8, 9.) On February 13, 2020, proceeding *pro se*, Ware filed an inmate civil rights complaint pursuant to 42 U.S.C. § 1983, (“Complaint”), seeking, monetary damages. (ECF No. 7.) The Complaint was screened in accordance with 28 U.S.C. § 1915A(a). (ECF No. 6.) In the Complaint, Ware named as defendants: (1) Correctional Officer Smith; (2) Correctional Officer Peterson; (3) the NDOC; (4) Baca; (5) the State of Nevada; (6) and Doe Defendant. (ECF Nos. 6, 7.) The Court dismissed, with

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<sup>1</sup> This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 prejudice, defendants NDOC and the State of Nevada. (ECF No. 6.) The Court also  
2 dismissed, without prejudice, defendants Baca and John Doe. (*Id.*) The Court allowed  
3 Ware to proceed on one claim for an Eighth Amendment conditions of confinement claim,  
4 and the Court granted Ware leave to file an amended complaint. (*Id.*) Ware filed his first  
5 amended complaint ("FAC"), which is the operative complaint in this case, on June 29,  
6 2020. (ECF No. 8.) The Court screened the FAC and allowed Ware's conditions of  
7 confinement claim to proceed against Defendants Smith and Peterson.<sup>2</sup> (ECF No. 9.)

8 Ware's FAC alleges the following: On December 4, 2018, Ware was being  
9 transported from Carson-Tahoe Hospital to NNCC. (ECF Nos. 8, 9.) Correctional Officers  
10 Smith and Peterson placed Ware in the back of a transport van while Ware was in full  
11 restraints, including handcuffs and leg shackles. (*Id.*) Smith and Peterson failed to put a  
12 seatbelt on Ware (*Id.*) Peterson was driving aggressively, and Smith failed to admonish  
13 Peterson for his driving. (ECF No. 8.)<sup>3</sup> Peterson then made a reckless and malicious turn  
14 that caused Ware to slam into the side of the transport van. (*Id.*) Ware's head, shoulder,  
15 and arm made hard contact with the van, which resulted in Ware suffering a mild  
16 concussion, severe neck and back pains, and extreme and continuous headaches.<sup>4</sup> (*Id.*)

17 At the case management conference on May 28, 2021, the Court bifurcated  
18 discovery to first focus on the issue regarding exhaustion of Ware's administrative  
19 remedies. (ECF No. 28.) Discovery on the issue of exhaustion closed on June 28, 2021.  
20 (*Id.*)

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23 <sup>2</sup> On June 22, 2021, Peterson was dismissed from this action without prejudice for  
24 a failure to effectuate service pursuant to Fed. R. Civ. P. 4(m). (ECF No. 29.)

25 <sup>3</sup> The screening order, (ECF No. 9), states that Smith, not Peterson, was driving the  
26 van. Ware's FAC, (ECF No. 8), states that Peterson, not Smith, was driving the van.

27 <sup>4</sup> Pursuant to 28 U.S.C. 1915A(a), the Court screened Ware's FAC and dismissed,  
28 with prejudice, Ware's deliberate indifference to a serious medical need claim. (ECF No.  
9.) For this reason, the recitation of the facts is limited to Ware's Eight Amendment  
conditions of confinement claim.

1           Thereafter, Smith filed the instant motion for summary judgment arguing Ware  
 2 failed to exhaust his administrative remedies. (ECF No. 30.) Smith argues he is entitled  
 3 to summary judgment because Ware “did not file a first or second level grievance.  
 4 Therefore, [Ware] failed to fully exhaust the administrative grievance process prior to filing  
 5 his Complaint. . . .” (*Id.* at 6-7.)

6           Ware responded on October 14, 2021, by filing a cross-motion for summary  
 7 judgment. (ECF No. 36.) Ware asserts “that the reason the remedies were not exhausted  
 8 is because the AWP Lisa Walsh replied saying if [Ware] continues to p[u]rsue this issue,  
 9 [he] will receive a notice of charges if he continues to write another grievance about this  
 10 current situation.” (*Id.* at 2-3.) Ware also asserts that he “was in segregation and could  
 11 not get grievances in the mail due to being locked in a cell 24 hours a day. [Ware] was  
 12 dependent on C/O’s to pick up mail and/or grievances but could not control the C/O’s  
 13 actions.” (*Id.*) Ware also provides a grievance response from AWP Lisa Walsh. (*Id.* at 5.)

14           On November 4, 2021, Smith replied to Ware’s cross motion for summary  
 15 judgment. (ECF No. 37.) Smith alleges that Ware “fails [to] put forth sufficient evidence to  
 16 raise a genuine issue of material fact capable of defeating [Smith’s motion for summary  
 17 judgment].” (*Id.* at 4-5.) Smith also asserts that Ware “was not prevented from grieving  
 18 the alleged treatment.” (*Id.* at 5.)

## 19       **II.       LEGAL STANDARD**

20           “The court shall grant summary judgment if the movant shows that there is no  
 21 genuine dispute as to any material fact and the movant is entitled to judgment as a matter  
 22 of law.” Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The  
 23 substantive law applicable to the claim or claims determines which facts are material.  
 24 *Coles v. Eagle*, 704 F.3d 624, 628 (9th Cir. 2012) (citing *Anderson v. Liberty Lobby*, 477  
 25 U.S. 242, 248 (1986)). Only disputes over facts that address the main legal question of  
 26 the suit can preclude summary judgment, and factual disputes that are irrelevant are not  
 27 material. *Frlekin v. Apple, Inc.*, 979 F.3d 639, 644 (9th Cir. 2020). A dispute is “genuine”  
 28 only where a reasonable jury could find for the nonmoving party. *Anderson*, 477 U.S. at

1 248.

2 The parties subject to a motion for summary judgment must: (1) cite facts from the  
3 record, including but not limited to depositions, documents, and declarations, and then  
4 (2) “show [] that the materials cited do not establish the absence or presence of a genuine  
5 dispute, or that an adverse party cannot produce admissible evidence to support the fact.”  
6 Fed. R. Civ. P. 56(c)(1). Documents submitted during summary judgment must be  
7 authenticated, and if only personal knowledge authenticates a document (i.e., even a  
8 review of the contents of the document would not prove that it is authentic), an affidavit  
9 attesting to its authenticity must be attached to the submitted document. *Las Vegas*  
10 *Sands, LLC v. Neheme*, 632 F.3d 526, 532-33 (9th Cir. 2011). Conclusory statements,  
11 speculative opinions, pleading allegations, or other assertions uncorroborated by facts  
12 are insufficient to establish the absence or presence of a genuine dispute. *Soremekun v.*  
13 *Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007); *Stephens v. Union Pac. R.R. Co.*,  
14 935 F.3d 852, 856 (9th Cir. 2019).

15 The moving party bears the initial burden of demonstrating an absence of a  
16 genuine dispute. *Soremekun*, 509 F.3d at 984. “Where the moving party will have the  
17 burden of proof on an issue at trial, the movant must affirmatively demonstrate that no  
18 reasonable trier of fact could find other than for the moving party.” *Soremekun*, 509 F.3d  
19 at 984. However, if the moving party does not bear the burden of proof at trial, the moving  
20 party may meet their initial burden by demonstrating either: (1) there is an absence of  
21 evidence to support an essential element of the nonmoving party’s claim or claims; or (2)  
22 submitting admissible evidence that establishes the record forecloses the possibility of a  
23 reasonable jury finding in favor of the nonmoving party. See *Pakootas v. Teck Cominco*  
24 *Metals, Ltd.*, 905 F.3d 565, 593-94 (9th Cir. 2018); *Nissan Fire & Marine Ins. Co. v. Fritz*  
25 *Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). The court views all evidence and any  
26 inferences arising therefrom in the light most favorable to the nonmoving party. *Colwell v.*  
27 *Bannister*, 763 F.3d 1060, 1065 (9th Cir. 2014). If the moving party does not meet its  
28 burden for summary judgment, the nonmoving party is not required to provide evidentiary

1 materials to oppose the motion, and the court will deny summary judgment. *Celotex*, 477  
2 U.S. at 322-23.

3 Where the moving party has met its burden, however, the burden shifts to the  
4 nonmoving party to establish that a genuine issue of material fact actually exists.  
5 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, (1986). The  
6 nonmoving party must “go beyond the pleadings” to meet this burden. *Pac. Gulf Shipping*  
7 *Co. v. Vigorous Shipping & Trading S.A.*, 992 F.3d 893, 897 (9th Cir. 2021) (internal  
8 quotation omitted). In other words, the nonmoving party may not simply rely upon  
9 the allegations or denials of its pleadings; rather, they must tender evidence of specific  
10 facts in the form of affidavits, and/or admissible discovery material in support of its  
11 contention that such a dispute exists. See Fed. R. Civ. P. 56(c); *Matsushita*, 475 U.S. at  
12 586 n. 11. This burden is “not a light one,” and requires the nonmoving party to “show  
13 more than the mere existence of a scintilla of evidence.” *Id.* (quoting *In re Oracle Corp.*  
14 *Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010)). The non-moving party “must come forth  
15 with evidence from which a jury could reasonably render a verdict in the non-moving  
16 party’s favor.” *Pac. Gulf Shipping Co.*, 992 F.3d at 898 (quoting *Oracle Corp. Sec. Litig.*,  
17 627 F.3d at 387). Mere assertions and “metaphysical doubt as to the material facts” will  
18 not defeat a properly supported and meritorious summary judgment motion. *Matsushita*  
19 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986).

20 When a *pro se* litigant opposes summary judgment, his contentions in motions and  
21 pleadings may be considered as evidence to meet the non-party’s burden to the extent:  
22 (1) contents of the document are based on personal knowledge, (2) they set forth facts  
23 that would be admissible into evidence, and (3) the litigant attested under penalty of  
24 perjury that they were true and correct. *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir.  
25 2004).

26 Upon the parties meeting their respective burdens for the motion for summary  
27 judgment, the court determines whether reasonable minds could differ when interpreting  
28 the record; the court does not weigh the evidence or determine its truth. *Velazquez v. City*

1 of *Long Beach*, 793 F.3d 1010, 1018 (9th Cir. 2015). The court may consider evidence in  
 2 the record not cited by the parties, but it is not required to do so. Fed. R. Civ. P. 56(c)(3).  
 3 Nevertheless, the court will view the cited records before it and will not mine the record  
 4 for triable issues of fact. *Oracle Corp. Sec. Litig.*, 627 F.3d at 386 (if a nonmoving party  
 5 does not make nor provide support for a possible objection, the court will likewise not  
 6 consider it).

### 7 **III. DISCUSSION**

#### 8 **A. Exhaustion of Administrative Remedies**

9 Under the Prison Litigation Reform Act (“PLRA”), “[n]o action shall be brought with  
 10 respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a  
 11 prisoner confined in any jail, prison, or other correctional facility until such administrative  
 12 remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). Exhaustion is  
 13 mandatory. *Porter v. Nussle*, 534 U.S. 516, 524 (2002). The requirement’s underlying  
 14 premise is to “reduce the quantity and improve the quality of prisoner suits” by affording  
 15 prison officials the “time and opportunity to address complaints internally before allowing  
 16 the initiation of a federal case. In some instances, corrective action taken in response to  
 17 an inmate’s grievance might improve prison administration and satisfy the inmate, thereby  
 18 obviating the need for litigation.” *Id.* at 524–25.

19 The PLRA requires “proper exhaustion” of an inmate’s claims. *Woodford v. Ngo*,  
 20 548 U.S. 81, 90 (2006). Proper exhaustion means an inmate must “use all steps the prison  
 21 holds out, enabling the prison to reach the merits of the issue.” *Griffin v. Arpaio*, 557 F.3d  
 22 1117, 1119 (9th Cir. 2009) (citing *Woodford*, 548 U.S. at 90). Thus, exhaustion “demands  
 23 compliance with an agency’s deadlines and other critical procedural rules because no  
 24 adjudication system can function effectively without imposing some orderly structure on  
 25 the course of its proceedings.” *Woodford*, 548 U.S. at 90–91.

26 In the Ninth Circuit, a motion for summary judgment will typically be the appropriate  
 27 vehicle to determine whether an inmate has properly exhausted his or her administrative  
 28 remedies. *Albino v. Baca*, 747 F.3d 1162, 1169 (9th Cir. 2014). “If undisputed evidence

viewed in the light most favorable to the prisoner shows a failure to exhaust, a defendant is entitled to summary judgment under Rule 56. If material facts are disputed, summary judgment should be denied, and the district judge rather than a jury should determine the facts.” *Id.* at 1166. The question of exhaustion “should be decided, if feasible, before reaching the merits of a prisoner’s claim.” *Id.* at 1170.

Failure to exhaust is an affirmative defense. *Jones v. Bock*, 549 U.S. 199, 216 (2007). The defendant bears the burden of proving that an available administrative remedy was unexhausted by the inmate. *Albino*, 747 F.3d at 1172. If the defendant makes such a showing, the burden shifts to the inmate to “show there is something in his particular case that made the existing and generally available administrative remedies effectively unavailable to him by ‘showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile.’” *Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015) (quoting *Albino*, 747 F.3d at 1172).

#### **B. NDOC’s Inmate Grievance System**

Administrative Regulation (“AR”) 740 governs the grievance process at NDOC institutions. An inmate must grieve through all three levels: (1) Informal; (2) First Level; and (3) Second Level. (See ECF Nos. 30-3, 30-6.) The inmate may file an informal grievance within six months “if the issue involves personal property damages or loss, personal injury, medical claims or any other tort claims, including civil rights claims.” (ECF No. 30-3 at 11.) The inmate’s failure to submit the informal grievance within this period “shall constitute abandonment of the inmate’s grievance at this, and all subsequent levels.” (*Id.* at 12.) NDOC staff is required to respond within forty-five days. (*Id.*) An inmate who is dissatisfied with the informal response may appeal to the formal level within five days. (*Id.*)

At the first formal level, the inmate must “provide a justification to continue to the first level.” (*Id.* at 13.) “A First Level grievance should be reviewed, investigated and responded to by the Warden at the institution where the incident being grieved occurred.” (*Id.* at 12.) “The Warden may utilize any staff in the development of a grievance

1 response.” (*Id.*) The time limit for a response to the inmate . . . is forty-five” days. (*Id.* at  
2 14.) Within five days of receiving a dissatisfactory First Level response, the inmate may  
3 appeal to the Second Level, which is subject to still-higher review. (*Id.*) Officials are to  
4 respond to a Second Level grievance within sixty days, specifying the decision and the  
5 reasons the decision was reached. (*Id.* at 15.) Once an inmate receives a response to the  
6 Second Level grievance, he or she is considered to have exhausted available  
7 administrative remedies and may pursue civil rights litigation in federal court.

### 8 **C. Analysis**

9 Smith argues Ware did not properly exhaust his available administrative remedies  
10 with respect to the single claim alleged in this matter. (ECF Nos. 30, 37.) Specifically,  
11 although Ware filed two informal grievances related to the issues in this case, Smith  
12 contends Ware failed to appeal the responses of either of the informal grievances to the  
13 first or second administrative levels as required by AR 740. (ECF Nos. 30, 37.)

14 A review of the authenticated evidence submitted by Smith does establish Ware  
15 filed two informal grievances regarding the claim asserted in the FAC. (See ECF Nos. 30-  
16 1 at 17-19, 30-4, 30-5.) First, Ware filed an Informal Grievance Number 2006-30-75593.  
17 (ECF Nos. 30-1 at 19, 30-4.). The hard copy of this informal grievance provided by Smith  
18 is unintelligible. However, Smith also submitted a copy of the “Improper Grievance  
19 Memorandum,” provided to Ware in response to this grievance as well as a summary of  
20 Ware’s grievance history from NDOC’s internal grievance tracking system. (ECF Nos. 30-  
21 1, 30-4.)

22 According to NDOC’s grievance system, Grievance Number 2006-30-75593 was  
23 returned to Ware on December 21, 2018 because the grievance did not list a requested  
24 remedy. (ECF No. 30-1 at 19.) The hard copy documents submitted with respect to this  
25 grievance do not indicate whether this grievance was “denied” on this basis or whether  
26 the grievance was explicitly “rejected.” However, a later entry related to this grievance by  
27 NDOC states that Ware was provided a “rejection notice (DOC 3098)”, establishing that  
28 the information grievance was rejected—not simply denied. (*Id.*)

1 According to AR 740.03(5), if a grievance is “not accepted . . . the inmate may not  
2 appeal that decision at the next level.” (ECF No. 30-3 at 5.) Therefore, an inmate in this  
3 situation is prohibited from filing a first and/or second level grievance. Rather, the inmate’s  
4 only option would be to correct the deficiencies of the initial grievance and re-submit the  
5 grievance at the same level. (See ECF No. 30-4, DOC 3098 form provided to later issues  
6 with this grievance.) It appears this is exactly what Ware attempted to do.

7 According to NDOC’s records, Ware attempted to re-file this grievance at the  
8 informal level on January 11, 2019. (See ECF No. 30-1 at 19 (listing level of next  
9 transaction as “IF”).) This time NDOC issued a second “Improper Grievance  
10 Memorandum” claiming that Ware did not “appeal” the prior of “rejection” of his grievance  
11 within the 5-day time frame for *appealing* a response to the original grievance and thus  
12 his claim was deemed “abandoned.” (*Id.*; ECF No. 30-4 at 2.)

13 Based on NDOC’s own regulations, however, Ware was not *permitted* to file an  
14 appeal in this instance because his grievance was initially *rejected*—not denied. (ECF  
15 No. 30-3 at 5; ECF No. 30-1 at 19.) Therefore, the 5-day time limit for filing an appeal did  
16 not apply, and in fact, Ware was explicitly prohibited from filing an appeal in this  
17 circumstance. Moreover, there does not appear to be any timeframe listed in AR 740 for  
18 resubmitting a previously rejected grievance—aside from the normal six-month time  
19 frame required to submit an informal grievance in AR 740.08(4). (See ECF No. 30-3 at  
20 11.)

21 Ware resubmitted his informal grievance on January 11, 2019—within 6 months of  
22 the events alleged in this case as required by AR 740.08(4). Therefore, it appears NDOC  
23 employees failed to properly follow AR 740 when they refused to process Ware’s re-  
24 submitted informal grievance (which was not an appeal) and was timely. Based on all of  
25 this, Ware could not take any additional actions to exhaust this grievance—especially  
26 after NDOC stated his claim was “abandoned.”

27 The PLRA requires exhaustion only of those administrative remedies “as are  
28 available,”—it does not require exhaustion when circumstances render administrative

1 remedies “effectively unavailable.” See *Sapp v. Kimbrell*, 623 F.3d 821, 823 (9th Cir.  
2 2010); *Nunez v. Duncan*, 591 F.3d 1217 1224–26 (9th Cir. 2010) (holding that Nunez’s  
3 failure to timely exhaust his administrative remedies was excused because he took  
4 reasonable and appropriate steps to exhaust his Fourth Amendment claim and was  
5 precluded from exhausting, not through his own fault but by the Warden’s mistake).  
6 “[F]ailure to exhaust a remedy that is effectively unavailable does not bar a claim from  
7 being heard in federal court.” *McBride v. Lopez*, 807 F.3d 982, 986 (9th Cir. 2015). Based  
8 on the above and NDOC’s actions in processing Grievance Number 2006-30-975993, it  
9 appears there were no further administrative remedies available to Ware to exhaust this  
10 claim and summary judgment should be denied on this basis alone.

11       However, even assuming Ware was required to file a *new* informal grievance after  
12 Grievance Number 2006-30-75593 was rejected, Ware also attempted to do just that.  
13 Specifically, on December 21, 2019, after his first informal grievance was “rejected,” Ware  
14 filed a new informal grievance, Grievance Number 2006-30-76244, raising the same  
15 issues. (See ECF No. 30-5.) Although the hard copy of this informal grievance is also  
16 unintelligible, (see *id.* at 3), the documents submitted by Smith from NDOC’s internal  
17 tracking system appears to show that this grievance was also rejected because  
18 “grievances that have the same issue in a previously filed grievance will not be accepted.”  
19 (ECF No. 30-1 at 17.) Therefore, even if Ware was required to file an entirely new informal  
20 grievance after his first grievance was *rejected*, Ware’s attempt to do this were also  
21 prohibited by NDOC and there does not appear there were any further administrative  
22 remedies available to him with respect to Grievance Number 2006-30-76244 either.

23       Based on the record before the Court at this time, the Court finds Smith failed to  
24 meet his initial burden on summary judgment to establish that Ware did not exhaust his  
25 administrative remedies. Therefore, the burden does not shift to Ware to come forward  
26 with evidence to defeat summary judgment. Accordingly, Smith’s motion for summary  
27 judgment should be denied.

28       With respect to Ware’s cross-motion for summary judgment, Smith is correct that

1 Ware did not submit authenticated evidence to support his own motion for summary  
2 judgment. Moreover, as noted above, some of the evidence submitted by Smith was  
3 unintelligible at this time. Therefore, the Court cannot state, as a matter of law, that no  
4 issues of fact remain with respect to the issue of exhaustion. Therefore, the Court also  
5 finds that Ware has likewise failed to meet his initial burden on summary judgment and  
6 his cross-motion should likewise be denied.

7 **IV. CONCLUSION**

8 For good cause appearing and for the reasons stated above, the Court  
9 recommends that Smith's motion for summary judgment, (ECF No. 30), be denied, and  
10 that Ware's motion for summary judgment, (ECF No. 36), be denied.

11 The parties are advised:

12 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of  
13 Practice, the parties may file specific written objections to this Report and  
14 Recommendation within fourteen days of receipt. These objections should be entitled  
15 "Objections to Magistrate Judge's Report and Recommendation" and should be  
16 accompanied by points and authorities for consideration by the District Court.

17 2. This Report and Recommendation is not an appealable order and any  
18 notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the  
19 District Court's judgment.

20 **V. RECOMMENDATION**

21 **IT IS THEREFORE RECOMMENDED** that Smith's motion for summary judgment,  
22 (ECF No. 30), be **DENIED**, and Ware's motion for summary judgment, (ECF No. 36), be  
23 **DENIED**.

24 **DATED:** December 14, 2021.

25   
26 **UNITED STATES MAGISTRATE JUDGE**